

In this dental malpractice action, Plaintiff Frances Blanchard appeals the trial court's order granting the motion for summary judgment filed by Defendant/Appellee Arlene Kellum, D.D.S. We agree with the trial court that Dr. Kellum was entitled to summary judgment in this case and affirm the trial court's order.

The Plaintiff sought the services of Dr. Kellum after a periodontal specialist informed the Plaintiff that, as the result of a gum problem, she would be required to have her teeth extracted. On February 18, 1994, the Plaintiff appeared for a scheduled appointment with Dr. Kellum. During this appointment, Dr. Kellum began to extract all of the Plaintiff's teeth. After Dr. Kellum had pulled sixteen teeth, the Plaintiff refused to allow further extractions because of the pain and swelling in her mouth. As the Plaintiff was leaving Dr. Kellum's office, she lost consciousness and was transported by ambulance to a nearby hospital. She spent approximately one week in the hospital, where she was treated for hypertension and other related heart problems.

The Plaintiff subsequently filed this malpractice action against Dr. Kellum, asserting that the dental procedure was performed in a negligent manner and fell below the standard of reasonable dental care and practice in the community. The complaint also alleged that, prior to performing the dental procedure, Dr. Kellum failed to inform Plaintiff of her intention to extract all of the Plaintiff's teeth during the same appointment, failed to obtain consent to such a procedure, and failed to make an adequate inquiry as to the Plaintiff's general health or ability to withstand the procedure. In sworn answers to interrogatories, the Plaintiff repeated her allegations that she neither was informed of, nor consented to, the procedure performed by Dr. Kellum. Her answers further stated that, after being discharged from the hospital, Dr. Kellum pulled the rest of her teeth in a series of appointments.

Dr. Kellum filed a motion for summary judgment on the grounds that there was no genuine issue of material fact and that Dr. Kellum's treatment of the Plaintiff met the required standard of care. In the affidavit accompanying her motion, Dr. Kellum averred that she was familiar with the practices, treatments, and procedures followed by members of her profession, and that her treatment of the Plaintiff did not fall below the applicable standard of care in the community. The Plaintiff filed no affidavits to contradict these averments.

On appeal, the Plaintiff contends that the trial court erred in entering summary judgment in favor of Dr. Kellum because the Plaintiff's action was based on a theory of lack of informed consent and Dr. Kellum's affidavit failed to contradict the Plaintiff's sworn statements that she was not adequately informed of the procedure to be performed. *See Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993) (indicating that summary judgment is appropriate "only when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law").

This argument is without merit. We agree that the Plaintiff's complaint, in addition to asserting a claim for professional negligence, states a cause of action for battery because the complaint alleges that Dr. Kellum performed the procedure on the Plaintiff without obtaining the Plaintiff's informed consent. *See Cardwell v. Bechtol*, 724 S.W.2d 739, 750 (Tenn. 1987) (indicating that doctrine of battery is applicable to cases involving medical treatment performed without informed consent). Such medical battery actions may be distinguished from traditional medical malpractice actions in that the former are "predicated upon the theory that the [medical professional] committed a battery upon the patient," while the latter are "based upon [the medical professional's] negligent or unskilled treatment" of the patient. *Housh v. Morris*, 818 S.W.2d 39, 41 (Tenn. App. 1991).

Despite this distinction, however, in a medical malpractice action premised on lack of informed consent, the plaintiff still is required to present evidence, in the form of an expert opinion, that the defendant's conduct fell below the applicable standard of care. Specifically, the plaintiff is required to:

[P]rove by evidence as required by § 29-26-115(b)¹ that the defendant

¹Section 29-26-115(b) provides that:

No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by [section 29-26-115(a)] unless he was licensed to practice in the state or a contiguous bordering state a profession or specialty which would make his expert testimony relevant to the issues in the case and had practiced this profession or specialty in one of these states during the year preceding the date that the alleged injury or wrongful act occurred. . . .

did not supply appropriate information to the patient in obtaining his informed consent (to the procedure out of which plaintiff's claim allegedly arose) in accordance with the recognized standard of acceptable professional practice in the profession and in the specialty, if any, that the defendant practices in the community in which he practices and in similar communities.

T.C.A. § 29-26-118 (1980).

Contrary to the Plaintiff's suggestion in this case, this statute required the Plaintiff to allege, and ultimately to prove, that Dr. Kellum's failure to supply information to the Plaintiff about the procedure to be performed fell below the recognized standard of acceptable professional practice in the community. *See Cardwell v. Bechtol*, 724 S.W.2d 739, 750-51 (Tenn. 1987) (indicating that, pursuant to T.C.A. § 29-26-118, determining whether defendant failed to obtain informed consent is dependent upon evidence of standard of care of defendant's profession or specialty); *accord Roddy v. Volunteer Med. Clinic*, 926 S.W.2d 572, 576 (Tenn. App. 1996). Dr. Kellum's affidavit averred that all care, practices, treatment, and procedures administered by Dr. Kellum on the Plaintiff met the applicable standard of care. Faced with this evidence, it was incumbent upon the Plaintiff to come forward with evidence, in the form of an expert opinion, to substantiate the Plaintiff's claim that the information provided by Dr. Kellum prior to the procedure somehow fell below the acceptable standard of care in the community. *See Cardwell v. Bechtol*, 724 S.W.2d 739, 750-51 (Tenn. 1987) (indicating that, pursuant to T.C.A. § 29-26-118, standard of care for obtaining informed consent must be shown by expert evidence); *see also Shadrick v. Centennial Med. Ctr.*, No. 01A01-9604-CV-00145, 1996 WL 591179, at **5-6 (Tenn. App. Oct. 11, 1996). Absent such evidence to contradict Dr. Kellum's sworn statement that her treatment of the Plaintiff

T.C.A. § 29-26-115(b) (1980). Section 29-26-115(a) provides that:

In a malpractice action, the claimant shall have the burden of proving by evidence as provided by subsection (b):

(1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which he practices or in a similar community at the time the alleged injury or wrongful action occurred;

(2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and

(3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

T.C.A. § 29-26-115(a) (1980).

complied with the applicable standard of care, we conclude that the trial court properly granted summary judgment in favor of Dr. Kellum. *See Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993).²

In so holding, we note that the evidence required by section 29-26-118 was particularly important in this case because it was undisputed that the Plaintiff was provided with some information about the procedure to be performed by Dr. Kellum and, further, that the Plaintiff consented to having at least some of her teeth pulled. As this court has stated,

Liability predicated on the doctrine of informed consent is not dependent upon the existence of negligence in the performance of a physical act. Liability is predicated upon negligence of the physician in the failure to reasonably advise the patient regarding the treatment recommended. The necessary result of that failure is that any consent given by the patient for that treatment is said to be without an informed or knowledgeable consent. . . . However, in order to recover under this theory in a medical malpractice case, *there must be some medical testimony as to the usual and customary advice given to patients to procure consent in similar situations.*

German v. Nichopoulos, 577 S.W.2d 197, 202 (Tenn. App. 1978) (citations omitted) (emphasis added). Under the circumstances of this case, the Plaintiff could not simply rely on her own attestations that Dr. Kellum did not adequately inform her about the procedure.

The trial court's order entering summary judgment in favor of Dr. Kellum is affirmed. Costs of this appeal are taxed to the Plaintiff, for which execution may issue if necessary.

FARMER, J.

²In *Byrd v. Hall*, the Supreme Court of Tennessee explained the burden placed on the nonmoving party in a summary judgment proceeding:

When the party seeking summary judgment makes a properly supported motion, the burden then shifts to the nonmoving party to set forth specific facts, not legal conclusions, by using affidavits or the discovery materials listed in Rule 56.03 [T.R.C.P.], establishing that there are indeed disputed, material facts creating a genuine issue that needs to be resolved by the trier of fact and that a trial is therefore necessary. The nonmoving party may not rely upon the allegations or denials of his pleadings in carrying out this burden as mandated by Rule 56.05.

HIGHERS, J. (Concurs)

LILLARD, J. (Concurs)